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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1515

AMITY FABRICS, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Petitioner, Amity Fabrics, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Customs and Patent Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (p. 15, *infra*) is reported at 5 Customs Bulletin, No. 5 (January 20, 1971), pages 20-29, C.A.D. 1006. The opinion of the Customs Court (p. 25, *infra*) is reported at 62 Cust. Ct. 572, C.D. 3828, 305 F. Supp. 4 (1969).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on December 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1256.

QUESTIONS PRESENTED

A comprehensive revision of the tariff schedule was put into force in 1963, pursuant to the Tariff Classification Act of 1962. This new schedule omitted separate, more favorable, provision for waterproof cotton cloth, thus increasing the duty on the cloth which is the immediate subject of this case from 11% to 22½% ad valorem. The Tariff Commission had submitted a draft of a new tariff schedule to the Congress. The Tariff Classification Act provided for a new tariff schedule, to consist of the Tariff Commission draft, with certain changes, including changes "necessary to reflect changes in tariff treatment made by statute." The waterproof cloth provision had been amended by statute, Public Law 86-795, during the relevant period. The Commission refused to amend its draft to reflect this statute.

The questions presented are:

1. Was the statutory command "to reflect changes in tariff treatment made by statute" mandatory or discretionary on the Tariff Commission?

2. If discretionary, as held by the Court below, was the grant an unconstitutional delegation of legislative power?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Constitution, Article I, Section 8:

> "The Congress shall have Power to lay and collect . . . Duties . . . ."

2. Tariff Classification Act of 1962, 76 Stat. 72, Section 101.

This text, being lengthy, is set forth in Appendix A, p. 11, *infra.*

3. Tariff Act of 1930, Title I, 46 Stat. 590:

> "Par. 907 . . . waterproof cloth, wholly or in chief value of cotton or other vegetable fiber, whether or not in part of India rubber, 40 per centum ad valorem."[1]

4. Public Law 86-795, 74 Stat. 1052 (1960):

> "Section 2. In order to insure a correct interpretation of the provision 'waterproof cloth' in paragraph 907, Tariff Act of 1930, it is hereby declared that it was and is the true intent and meaning of paragraph 907 to limit the term 'waterproof,' when applied to cloth, 'wholly or in chief value of cotton or other vegetable fiber, whether or not in part of India rubber,' to cloths of a kind generally used in the manufacture of articles which are designed to afford protection against water to the extent expected in raincoats, protective sheeting, dress shields, umbrellas, and similar articles. Even when cloth possesses water repelling characteristics, it is not classifiable as waterproof cloth within the meaning of paragraph 907, Tariff Act of 1930, unless it is of a kind generally used in the manufacture of articles of the class specified in the preceding sentence."

5. Tariff Schedules of the United States Items 346.24, 355.65, 356.25, 798.00 and 798.50.

These texts, being lengthy, are set forth in Appendix B, p. 13, *infra.*

STATEMENT OF THE CASE

Amity Fabrics, Inc., imported a shipment of waterproof cotton velveteen on September 5, 1963, five days after the current tariff schedule, the Tariff Schedules of the United

---

[1] The rate of duty was reduced, by trade agreements, to 11%.

States (TSUS) became effective. It was classified by the Customs Bureau as "velveteen," and assessed with duty at 22½% ad valorem, under TSUS 346.24. It is not disputed that had the shipment arrived before August 31, it would have been classifiable under paragraph 907 of the prior schedule, as modified by Public Law 86-795, as "waterproof cloth . . . of cotton," and assessed with duty at 11% ad valorem.[2] The Customs Bureau classification was duly protested, and, upon denial, review thereof was pursued in the Customs Court under 28 U.S.C. § 1583.[3]

The case involves no issues of fact. The facts were stipulated in the trial court, and the case was submitted on the stipulation, without trial.

Petitioner submits as it did in the courts below, that separate provision for waterproof cotton cloth was omitted from the new tariff schedule wrongfully.[4] The Tariff Commission, which was charged with the duty of completing the text of the schedule before its formal promulgation, was directed by the Tariff Classification Act of 1962 to incorporate into the text it had proposed apt provisions to

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[2]So held in *Amity Fabrics v. United States,* 51 Cust. Ct. 97 (1963); appeal dismissed, 51 CCPA (Customs) 129 (1964).

[3]This is a test case, under which many other cases involving waterproof velveteen, as well as other waterproof cotton cloths, brought by petitioner and other plaintiffs, have been suspended in the Customs Court under Rule 16 (now Rule 14.7), pending the outcome of this case.

[4]The tariff schedule is constructed of successively wider categories, so that the omission of a narrower, more specific category, relegates the product to the next wider category. Thus, in the absence of a waterproof cotton cloth tariff item, the product falls into the cotton velveteen item. Had the cotton velveteen item also been omitted, the cloth would then be classifiable as woven cotton cloth, colored, under TSUS 322,—. Similarly, additional omissions would drop the product, successively, into TSUS 339.10 (woven fabrics, other), TSUS 386.30 (other textile articles), TSUS 798.00 or 798.50 (nonenumerated articles similar to any enumerated articles or articles) and, finally, TSUS 799.00 (other nonenumerated articles).

reflect statutes enacted by the Congress after the preparation of the Commission's initial proposal for a new tariff schedule. In this interim period, the old tariff provision for waterproof cotton cloth has been modified by Public Law 86-795, and, thereby, reaffirmed.[5] The failure of the Tariff Commission to incorporate a waterproof cloth provision, as so modified by the Congress, was, it is submitted, in plain violation of Sec. 101(b)(4)(A) of the 1962 Act.

Petitioner's basic contention has been that the old tariff provision for waterproof cotton cloth, never having been validly superseded, remains in effect, and should be applied to the instant importation.[6] Petitioner also suggested possible alternative remedies for the wrongful omission.

REASONS FOR GRANTING THE WRIT

By the Tariff Classification Act of 1962, the Congress ventured upon a wholly novel method of legislation, without precedent. Comprehensive tariff acts, in prior years, had always contained detailed specifications for thousands of products; the resulting statute was typically, hundreds of pages long. Congressional consideration usually occupied many months, and sometimes years, in committee and in floor debate. In the 1962 Act, the Congress took a voluminous draft which had been prepared pursuant to its direc-

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[5]This statute was enacted following the decision in *D.H. Grant & Co. v. United States*, 47 CCPA (Customs) 21 (1959); affg. 42 Cust. Ct. 51 (1959), to prevent otherwise useless waterproofing solely to qualify for lower duty rates. The legislative history was reviewed in detail in *Amity Fabrics v. United States, supra*, note 2, where the Court said it was "clearly . . . the intention of the legislature to preserve the status of fabrics designedly rendered waterproof for the bona fide use of that protective quality of the cloth." At 106.

[6]The Tariff Classification Act made the repeal of the old tariff, and the substitution of a new one, "subject to subsection (b)" of Section 101 thereof. If, as petitioner contends, subsection (b) was violated, the repeal and substitution have not been validly accomplished, and the old paragraph 907, therefore, remains in force.

tion by the Tariff Commission, prescribed modifications therein, specified a procedure for the promulgation of the tariff schedules so formulated, and decreed its legislative force as a substitute for the prior, 1930, tariff schedules. Thus, new tariff schedules came into being without Congressional hearings, without product-by-product committee reports, without floor debate on individual products. If, as petitioner contends, the directions for modification of the draft schedule were mandatory, the Congress succeeded in creating a procedural device for enacting a complex statute efficiently, without any delegation of its Constitutional powers. If, as the Court below held, discretionary power was delegated to the Tariff Commission, such a delegation raises a serious question of constitutionality under *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).

The integrity of this novel legislative device was undermined by the decision below, thereby presenting an important question of federal law which has not been, but should be, settled by this Court.

The Congress, jealous of its constitutional power "to lay and collect . . . duties," Art. I, Sec. 8, carefully designed the Tariff Classification Act of 1962, by laying only ministerial duties on the Tariff Commission, to avoid any delegation of legislative power. It employed the Tariff Commission to conduct hearings, to make a report, and to draft a new tariff schedule. But all this preceded the operative legislative act, the 1962 statute, which provided for bringing a new tariff schedule into force. This tariff schedule was to consist of the text proposed by the Tariff Commission in two reports, with only

> "such changes . . . as the Commission decides– (A) are necessary to reflect changes in tariff treatment made by statute or under authority of law . . . or (B) are otherwise necessary."

Changes in the first of these categories (statutory or under authority of law) "must necessarily be reflected in the new

tariff schedules;"[7] those in the second must lie over in the Congress for 60 days, obviously to permit Congressional review, § 101(c)(2)(A). This requirement was not applicable to changes made to reflect statutory tariff modifications. Such changes, stemming from acts of the Congress itself, required no fresh review by the Congress; such acts "must necessarily be reflected in the new tariff schedules."

Thus, the 1962 statute was tightly drafted to retain in the Congress the complete legislative power. The new tariff schedule was to consist of a text in being, approved by specific reference, with only such changes as either the Congress had already provided for, or changes it would review under the 60-day procedure. Indeed, the Tariff Commission, itself, in every case but that involving waterproof cloth, treated § 101(b)(4)(A) as mandatory. During the applicable period, the Congress enacted 28 statutes changing tariff treatment. The Tariff Commission made appropriate and timely changes in the draft tariff schedule to reflect 27 of these statutes. In the case of every one of these 27 statutes, the Tariff Commission simply recorded its incorporation of the substance of the statute in the tariff schedule. There was not a word of further explanation, not a hint that the Commission considered itself to be exercising any discretion. Plainly, the Tariff Commission construed § 101(b)(4)(A), as we do, to be mandatory, in every case but one. Only in the case of Public Law 86-795 did the Commission refuse to accept the statutory direction as mandatory. A tabulation of these statutes follows.

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[7] These words were used in both committee reports, and in floor debate by the principal sponsors of the legislation. House Report No. 1415 (87th Cong.), page 4; Senate Report No. 1317 (87th Cong.), page 4; 108 Cong. Rec., Pt 3 (87th Cong., 2d Sess.), page 4057 (Rep. Mills, Chairman of the Committee on Ways and Means); *Ibid.*, page 4056 (Rep. Sisk, reporting the rule for consideration of the bill).

Statutes Enacted Between July 31, 1960, and August 17, 1963 Requiring Changes in the Tariff Schedules of the United States

Public Law No.	Date of Approval	Subject	Changes Made by Tariff Commission		
			Supp.#	Sched.#	Ref.#
86-795	9-15-60	Heptanoic Acid; Waterproof cloth	Not incorporated		
86-800	9-16-60	Bamboo Pipe Stems	1	7	28
87-59	6-27-61	Cashmere Goat Hair	1	3	8
87-95	7-20-61	Electron Microscopes	1	8	5
87-110	7-26-61	Metal Scrap;	1	1	2, 14
		Horsemeat	1	App	3
87-132	8-10-61	Returning residents	1	8	4
		(tourist exemption)	1	App	5
87-261	9-21-61	Gifts, non-residents	1	8	2
87-455	5-21-62	Records, diagrams, etc.	4	8	16
87-456	5-24-62	Tariff Reclassification Act	4	GH&RI	1
87-497	6-25-62	Amorphous Graphite	4	App	20
87-514	7- 1-62	Metal Scrap	4	App	21
87-567	8- 2-62	Alumina & bauxite	4	App	19
87-602	8-24-62	Spun silk yarn	4	App	18
			6	App	41
87-604	8-24-62	Religious articles	4	8	15
87-606	8-24-62	Casein	4	4	4
			4	App	20
87-607	8-24-62	Shoe lathes	4	App	22
87-770	10- 9-62	Fowling Nets	4	8	16
87-790	10-10-62	Personal & household effects; Monofilament gill nets	4	App	24
			4	8	16
87-794	10-11-62	Trade Expansion Act	4	GH&RI	1
			4	App	26, 28
87-859	10-23-62	Coconut, etc., oils	4	App	17
87-878	10-24-62	Natural grasses, etc.	4	7	14
88-32	5-29-63	Cork Insulation	7	App	9
88-49	6-29-63	Chicory	7	App	7
88-50	6-29-63	Metal scrap	7	App	11
88-53	6-29-63	Exemption for returning residents	7	App	12
88-90	8- 8-63	Istle	7	App	8
88-92	8- 8-63	Tanning extracts	7	App	10
88-93	8- 8-63	Heptanoic acid	7	App	9

Note: The Tariff Commission submitted seven reports supplemental to its Tariff Classification Study. The First Supplemental Report was printed separately; the other six reports are now available in a combined single printed volume. Both are denominated in the Tariff Commission's "Miscellaneous Series" of publications.

The case at bar is important because, it is submitted, the Court below misconstrued the congressional objective, and treated the 1962 Act as though it were the common regulatory statute, couched in general terms, and delegating wide discretionary authority to an administrative body. The plain objective of the Congress, to develop a form of legislation which would avoid delegation, was frustrated by the decision below. That decision implies that, however carefully the Congress tries to preserve its full legislative prerogative, the courts may, nevertheless find an area of discretion, and permit the statute to drift into the mass of regulatory law in which administrative agencies, under general statutory guides, make substantive decisions.

If, as the Court below concluded, the Congress meant to give the Commission the power to choose between including or excluding recent statutes of the Congress, itself, a serious constitutional question arises. The Tariff Classification Act provides no standard to govern such a choice by the Commission.[8] In *Panama Refining Co. v. Ryan,* when

[8]The provision in Section 101(b)(4), referring to the standards applied by the Commission in its initial proposal for a new tariff schedule can only have applicability to changes deemed "otherwise necessary," and subject to the 60 day layover period. The standards the Commission applied are set forth in its 1960 report, Tariff Classification Study, Submitting Report (Misc. Series, Nov. 15, 1960), pages 6-7. These were couched in terms of a "simplification of existing tariff schedules," and "reflect[ed] rates of duty in force as of July 31, 1960," *ibid.* at 28. Such standards can provide no guidance in deciding whether to accept or reject changes in the prior tariff prescribed by the Congress, itself, after July 31, 1960. Both congressional committees made it plain, in identical language, that they understood the "Commission shall apply the standards" language to refer only to changes "otherwise necessary." The committees both said with respect to § 101(b)(4): "This authority is included for the purpose of incorporating in the tariff schedules interim changes made by statute or under authority of law, for correcting error, and for making such other changes as are shown by continued review to conform to the purposes and standards of the tariff study, i.e., the purposes and standards the Tariff Commission 'applied in its report of November 15, 1960'." House Report No. 1415 (87th Cong.), page 7; Senate Report No. 1317 (87th Cong.), page 7.

the executive was given the bald choice, to accept or reject state regulatory action as a basis for federal control, "without standard or rule, to be dealt with as he pleased," the delegation was held unconstitutional, 293 U.S. 388, 419 (1935). If the statute here involved be read, as the Court below did, to afford discretion, that such discretion was left "without standard or rule," and, therefore, would be an unconstitutional delegation of power.

It is submitted that the case at bar presents these serious and important issues of law, which merit resolution by this Court.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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March 26, 1971

APPENDIX A

Public Law 87-456
87th Congress, H. R. 10607
May 24, 1962

An Act

To amend the Tariff Act of 1930 and certain related laws to provide for the restatement of the tariff classification provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Tariff Classification Act of 1962". Tariff Classification Act of 1962.

TITLE I—ADOPTION OF REVISED TARIFF SCHEDULES

SEC. 101. (a) The Tariff Act of 1930, as amended, is amended by striking out titles I and II (19 U.S.C. 1001 and 1201) and, subject to subsection (b) of this section and to sections 102 and 103 of this Act, by substituting in lieu thereof a new title I entitled "Title I—Tariff Schedules of the United States". 46 Stat. 590, 672. 76 STAT. 72. 76 STAT. 73.

(b) Such new title I (hereinafter in this Act referred to as the "Tariff Schedules of the United States") shall consist of—

(1) the general headnotes and rules of interpretation;

(2) schedules 1 to 8, inclusive; and

(3) the appendix to the tariff schedules;

all as set forth in the report of the United States Tariff Commission (hereinafter in this Act referred to as the "Commission") entitled "Tariff Classification Study, Proposed Revised Tariff Schedules of the United States", dated November 15, 1960, as changed by the "First Supplemental Report" (January, 1962); and

(4) subject to subsection (c), such changes in the provisions identified in paragraphs (1), (2), and (3) of this subsection as the Commission decides—

(A) are necessary to reflect changes in tariff treatment made by statute or under authority of law, arising either before the date of the enactment of this Act or on or after such date of enactment and before the date on which the Tariff Schedules of the United States is published pursuant to subsection (d), or

(B) are otherwise necessary.

In its determinations under this paragraph, the Commission shall apply the standards it applied in its report of November 15, 1960, referred to above.

(c)(1) The Commission shall include the changes provided for in subsection (b)(4), together with the reasons therefor, in one or more supplemental reports which shall be promptly published and submitted to the President and the Congress. The delivery to the Senate and to the House of Representatives shall be made on the same day. In its supplemental reports the Commission shall include written views submitted to the Commission, and testimony before the Commission, with respect to provisions of the proposed Tariff Schedules of the United States, together with the comments of the Commission on such views and testimony. Supplemental reports to President and Congress.

(2)(A) No change submitted pursuant to the authority contained in subsection (b)(4)(B) shall become effective unless, following the date on which the supplemental report containing such change was submitted to the Congress and before the date on which the Tariff Schedules of the United States is published pursuant to subsection (d), a period of 60 calendar days of continuous session of the Congress has elapsed.

(B) For purposes of suoparagraph (A)—

(i) continuity of session shall be considered as broken only by an adjournment of the Congress sine die; but

(ii) in the computation of the 60-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain.

(3) No changes included by the Commission in any supplemental report submitted after the date of the enactment of this Act shall become effective unless included in the Tariff Schedules of the United States as published pursuant to subsection (d).

(d) At the earliest practicable date before the date of the proclamation of the President provided for by section 102, the President shall cause the Tariff Schedules of the United States to be published.

APPENDIX B

1. TSUS Item 346.24

Pile fabrics, in which the pile was inserted or knotted during the wearing or knitting, whether or not the pile covers the entire surface, and whether the pile is wholly or partly cut or is not cut:

Of cotton:

* * *

Velveteens:

* * *

Other, including twill-back:

* * *

346.24	Valued over $1.10 per square yard	22.5% ad val.

2. TSUS Item 355.65

Woven or knit fabrics (except pile or tufted fabrics), of textile materials, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics, except foam or sponge sheet:

355.65	Of vegetable fibers	11% ad val.

3. TSUS Item 356.25

Woven or knit fabrics (except pile or tufted fabrics), of textile materials, coated or filled, not specially provided for:

* * *

Other

356.25	Of vegetable fibers	10% ad val.

4. TSUS Items 798.00 and 798.50

Any article, not provided for elsewhere in these schedules:

Which is similar in the use to which it may be applied to any article or articles enumerated in any of the foregoing provisions of these schedules as chargeable with duty:

798.00	Most resembling as to use a particular enumerated article chargeable with duty.	The same rate of duty as the particular enumerated article which it most resembles as to use.
798.50	Not most resembling as to use a particular enumerated article chargeable with duty, but equally resembling as to use two or more enumerated articles chargeable with duty.	The rate of duty applicable to that one of such two or more articles which it most resembles in respect to the materials of which it is composed.

[Note: The rates of duty shown here are the Column 1 rates in effect at the time of the importation in the case at bar. The Column 2 rates (not shown) were, and are, applicable only to products of communist countries.]

APPENDIX C

COURT OF CUSTOMS AND PATENT APPEALS

(C.A.D. 1006)

Twill back velveteen pile fabric—waterproof cotton cloth—public law—TSUS

AMITY FABRICS, INC. v. THE UNITED STATES No. 5362

United States Court of Customs and Patent Appeals,
December 30, 1970

Appeal from United States Customs Court, C.D. 3828

[Affirmed.]

George Bronz, attorney of record, for appellant.
William D. Ruckelshaus, Assistant Attorney General, *Andrew P. Vance*, Chief, Customs Section, *Peter Jay Baskin* for the United States.

[Oral argument October 6, 1970 by Mr. Bronz and Mr. Baskin]

Before RICH, ALMOND, BALDWIN, LANE, *Associate Judges*, and MCMANUS, *Judge*, Northern District of Iowa, sitting by designation.

ALMOND, *Judge*, delivered the opinion of the court:

This is an appeal from the decision and judgment of the United States Customs Court, Second Division,[1] holding that the imported twill back velveteen pile fabric is *eo nomine* provided for in item 346.24 of the Tariff Schedules of the United States (TSUS), 22.5 per cent ad valorem, and is subject to duty as so classified.

Appellant contends that the merchandise is properly classifiable under paragraph 907 of the Tariff Act of 1930, as modified and supplemented by T.D. 51802 and T.D. 54399, respectively, and as amended by Public Law 86–795, as waterproof cloth, with duty assessable at 11 per cent ad valorem. In the alternative, appellant suggests the applicability of items 355.65, 356.25, 798.00 or 798.50, TSUS. Appellant further contends that if none of the above are applicable, the assessment is unlawful, and the merchandise should therefore be admitted free of duty.

[1] 62 Cust. Ct. 572, C.D. 3828 (1969).

The statutes involved are set forth in pertinent part. The goods were classified under:

Schedule 3, Part 4, TSUS:

	Pile fabrics, in which the pile was inserted or knotted during the weaving or knitting, whether or not the pile covers the entire surface, and whether the pile is wholly or partly cut or is not cut:	
	Of cotton:	
	* * * * * * *	
	Velveteens:	
	* * * * * * *	
	Other, including twill-back:	
	* * * * * * *	
346.24	Valued over $1.10 per square year	22.5% ad val.

Appellant's claim is asserted under:

Paragraph 907, Tariff Act of 1930, as modified by the General Agreement on Tariffs and Trade, T.D. 51802, as supplemented by Presidential Proclamation, T.D. 54399, and as amended by Public Law 86–795:

Waterproof cloth, wholly or in chief value of cotton or other vegetable fiber, but not in part of India rubber	11% ad val.

Public Law 86–795:

> SEC. 2. In order to insure a correct interpretation of the provision "waterproof cloth" in paragraph 907, Tariff Act of 1930, it is hereby declared that it was and is the true intent and meaning of paragraph 907 to limit the term "waterproof", when applied to cloth, "wholly or in chief value of cotton or other vegetable fiber, whether or not in part of India rubber", to cloths of a kind generally used in the manufacture of articles which are designed to afford protection against water to the extent expected in raincoats, protective sheeting, dress shields, umbrellas, and similar articles. Even when cloth possesses water repelling characteristics, it is not classifiable as waterproof cloth within the meaning of paragraph 907, Tariff Act of 1930, unless it is of a kind generally used in the manufacture of articles of the class specified in the preceding sentence.

Alternative provisions asserted below:

Schedule 3, Part 4, TSUS:

	Woven or knit fabrics (except pile or tufted fabrics) of textile materials, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics, except foam or sponge sheet:	
355.65	Of vegetable fibers	11% ad val.
	Woven or knit fabrics (except pile or tufted fabrics) of textile materials, coated or filled, not specially provided for:	
	* * * * * * *	
	Other:	
356.25	Of vegetable fibers	10% ad val.

Schedule 7, Part 14, TSUS:

	Any article, not provided for elsewhere in these schedules:	
	Which is similar in the use to which it may be applied to any article or articles enumerated in any of the foregoing provisions of these schedules as chargeable with duty:	
798.00	Most resembling as to use a particular enumerated article chargeable with duty	The same rate of duty as the particular article which it most resembles as to use.
798.50	Not most resembling as to use a particular enumerated article chargeable with duty, but equally resembling as to use two or more enumerated articles chargeable with duty	The rate of duty applicable to that one of such two or more articles which it most resembles in respect to the materials of which it is composed.

The Tariff Classification Act of 1962, section 101(b), P.L. 87–456, provides in relevant part that:

> (b) Such new title I (hereinafter in this Act referred to as the "Tariff Schedules of the United States") shall consist of—
>
> (1) the general headnotes and rules of interepretation;
>
> (2) schedules 1 to 8, inclusive; and
>
> (3) the appendix to the tariff schedules; * * * and
>
> (4) subject to subsection (c), such change in the provisions identified in paragraphs (1), (2), and (3) of this subsection as the Commission decides—
>
> (A) are necessary to reflect changes in tariff treatment made by statute or under authority of law, arising either before the date of the enactment of this Act or on or after such date of enactment and before the date on which the Tariff Schedules of the United States is published pursuant to subsection (d), or
>
> (B) are otherwise necessary.
>
> In its determinations under this paragraph, the Commission shall apply the standards it applied in its report of November 15, 1960 * * *.

The questions presented by the record are succinctly stated by appellee as follows:

> 1. Whether section 101(b)(4)(A) of the Tariff Classification Act of 1962 provided for mandatory rather than discretionary action on the part of the Tariff Commission.
>
> 2. Whether Public Law 86–795 constituted a change in tariff treatment of such a nature that the Tariff Commission was compelled under section 101(b)(4)(A), *supra*, to incorporate the change into the new tariff schedules.
>
> 3. Whether Congress had adopted the changes proposed by the Tariff Commission with respect to waterproof cloth.
>
> 4. Whether appellant is entitled to the relief which it claims.

The case was submitted for decision below upon written stipulation of counsel to the effect that the merchandise in question consists of first quality twill back velveteen pile fabric similar in all material respects, including waterproofing, to the merchandise in *Amity Fabrics, Inc.* v. *United States*, 51 Cust. Ct. 97, C.D. 2416 (1963), appeal dismissed 51 CCPA 129 (1964). In that case the merchandise was held to be dutiable at the rate of 11 per cent ad valorem under paragraph 907, Tariff Act of 1930, as modified, supplemented and/or as amended. The record in C.D. 2416 was incorporated and made a part of the record herein.

The Customs Court observed that while the ultimate question to be determined herein is the proper classification of the subject merchandise, the resolution of this question depends not upon the character and composition of the cloth, which have been stipulated, but upon the fundamental issue of whether in failing to incorporate a specific

provision for waterproof cloth into the Tariff Schedules of the United States, the Tariff Commission violated the dictates of the Tariff Classification Act of 1962, Public Law 87–456.

Appellant's contention is that Public Law 86–795, which interpreted paragraph 907 of the Tariff Act of 1930, was a statutory change in the tariff treatment of waterproof cloth which should have been reflected in the TSUS by virtue of section 101(b)(4)(A) of the Tariff Classification Act of 1962. Appellant submits that the failure of the Tariff Commission to so provide requires classification of the instant merchandise under paragraph 907 of the Tariff Act of 1930, as amended by Public Law 86–795, which allegedly has not been validly superseded. Alternatively, appellant desires classification under various other TSUS items, or as an article entitled to free entry as not one covered by any valid provision of the TSUS.

Appellee's position, in essence, is that the Tariff Commission was exercising its discretionary powers pursuant to section 101(b)(4)(A) of the Tariff Classification Act of 1962 when it chose not to include a specific provision for waterproof cloth in the TSUS. In this connection the Customs Court stated:

> Assuming arguendo, though we do not so find, that Public Law 86–795 was a "change in tariff treatment," we nevertheless are of the opinion that the instructions given to the Commission in section 101(b)(4)(A) of the Tariff Classification Act were discretionary rather than mandatory and that plaintiff is without grounds to challenge the Commission's use of its discretion.

The conclusion that Congress invested the Commission with discretionary powers is amply supported by the explicit language of section 101(b)(4)(A), which provides that the schedules shall include:

> * * * such changes * * * *as the Commission decides*—
> (A) are necessary to reflect changes in tariff treatment made by statute * * *. [Emphasis added.]

We believe it clear that the words employed by Congress demonstrate that it was conferring specific authorization on the Commission to judge and determine whether statutes passed before the date on which the TSUS were finally published constituted changes in tariff treatment which required modification of the TSUS. We think it rationally deducible that the Commission decided that Public Law 86–795 was not a change in tariff treatment, or if it were a change, it was not such which required a change in the tariff schedules. It is our view that neither by way of omission or commission did the Commission act beyond the scope of its authority in deciding that Public Law 86–795 did not require the incorporation of a provision for waterproof cloth into the tariff schedules. What it did was in the proper exercise of the powers conferred on it by Congress.

While we do not deem it necessary to a resolution of the issues here presented to discuss *in extenso* the matter of legislative history including Congressional debate and observations, suffice it to say that in our view the legislative history of section 101(b) amply supports the conclusion that Congress intended that the Commission use its discretion in determining whether certain changes were to be made in the tariff schedules. The joint statement of both the House Ways and Means Committee and the Senate Finance Committee supports this conclusion. That statement is as follows:

> The only changes which can be made in the tariff schedules, after the enactment of this bill, will be those which the *Tariff Commission finds are required to be made* by virtue of legislation, court decisions, or authoritative administrative decisions, all of which necessarily must be reflected in the new tariff schedules. *Certain other changes*, such as those necessary to correct errors or inadvertent omissions or to clarify language cannot be made until reviewed by Congress. [House Report No. 1415 (87th Cong.), page 4; Senate Report No. 1317 (87th Cong.), page 4.] [Emphasis supplied.]

We are of the opinion that the statute itself as well as the Senate and House reports is convincing that it was within the Tariff Commission's discretion to determine if Public Law 86–795 was a change in the tariff treatment which required a change in the new tariff schedules. It is not within the province of this court to say whether such discretion was prudently conferred or wisely used.

> It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. [*United States* v. *George S. Bush & Co.*, 310 U.S. 371 (1940).]

We therefore find that the Tariff Commission had to determine the effects of Public Law 86–795 upon the 1930 provision for waterproof cloth and upon the proposed TSUS, and its use of discretion in not modifying the tariff schedules to provide *eo nomine* for waterproof cloth is not subject to being judicially disturbed absent an abuse of that discretion.

As to the question of which TSUS item applies to the imported merchandise, we agree with the Customs Court that the importations at bar are properly classifiable as plain back velveteen in item 346.24 of the TSUS. In regard to alternative items under which appellant seeks classification, we adopt the reasoning of the Customs Court where it was stated:

> Since the parties have agreed that the velveteen in question is a pile fabric, it is not classifiable, either directly or by similitude,

> under item 355.65 or 356.25, which specifically except pile fabrics. Nor is it classifiable under items 798.00, 798.50 * * * since the provision under which the goods were assessed most specifically describes the importation. Nor can they be admitted free of duty for the reason that there is a dutiable provision for velveteen validity [sic] in force.

The judgment of the Customs Court overruling the protest claims and sustaining the classification of the subject importations as plain back velveteen in item 346.24 of the TSUS is *affirmed*.

RICH, Judge, concurring.

I agree that we should affirm the decision below. My reasons for doing so, however, are somewhat different from those which I seem to find in the majority opinion, at least in emphasis.

This is an unusual case not given to absolutes in reaching a conclusion. One of its most unusual features is that appellant, as the majority says, claims classification unde the Tariff Act of 1930, as amended, which act had been wholly repealed at the time of the importations. In effect, appellant asks us to revive it as to only one provision, paragraph 907. This would indeed create an anomolous situation, reviving by judicial fiat one provision of a law repealed by Congress. Reason and common sense argue against doing such a thing if it can be avoided.

The majority opinion repeats the four points which the government brief says are involved on this appeal: 1. whether section 101 (b)(4)(A) was mandatory on the Tariff Commission or gave it discretion; 2. whether Public Law 86–795 was a "change"; 3. whether Congress adopted (i.e., ratified) the changes made by the Tariff Commission with respect to "waterproof cloth"; and 4. whether appellant is entitled to the relief it claims. The majority rests its decision altogether on the holding that the Tariff Commission acted entirely within the discretion conferred upon it in determining that Public Law 86–795 was not a change in tariff treatment, or at least not *such* a change as required a change in tariff schedules. I feel this is an oversimplification and somewhat misleading for the reason that the Tariff Commission actually did make a *change* in the tariff schedules with respect to waterproof cloth of cotton or other vegetable fiber. That is what appellant's complaint is based on; under paragraph 907 of the 1930 Act is paid 11% duty and now it has to pay 22.5% because of that change.

The pivotal point of the situation on which appellant relies, moreover, is the decision of this court in *United States* v. *D. H. Grant & Co.*, 47 CCPA 20, C.A.D. 723 (1959), not mentioned in the majority

opinion. The only reason it can be argued that Public Law 86–795 was a "change" in "tariff treatment" which the Tariff Commission was obliged to include in the TSUS is that (a) the *Grant* case, interpreting paragraph 907, gave it a construction that neither the Customs Bureau nor Congress liked, holding to be of no effect a Customs Bureau Letter (T.D. 53630, Oct. 11, 1954) which attempted to plug a loophole, and (b) that Public Law 86–795, enacted by Congress, did what the Customs Bureau Letter was not permitted by this court to do—that is to plug the loophole which Congress said had never been intended, thus effectively overruling the *Grant* case. All the while Congress was making it clear that, so far as it was concerned, the *statutory* law had always been the same, the trouble being with the construction that this court had put on paragraph 907. This construction had made possible avoidance of the intended duty on certain cotton cloth by temporarily waterproofing it merely for the purposes of duty assessment, the waterproofing being removed after the cloth was inside the country. But for the *Grant* case there would have been no need for Public Law 86–795, nor any ground for appellant's argument that a change in tariff treatment took place which had to be included in the new schedules (the odd effect of which would have been to include in TSUS the pre-*Grant statutory* law, as supplemented by the Customs Bureau Letter, wiping out *Grant and* Public Law 86–795 because the latter overruled the former). So the situation is not a simple one.

My view on the government's first issue—whether section 101 (b) (4) (A) is mandatory or gives discretion—is that it is both. It cannot be gainsaid that the language gives *some* discretion, otherwise the Commission is not in a position to "decide" anything. At the same time it tells the Commission certain things it is to do. With respect to "waterproof cloth" the Commission, knowing it had a problem, devised a solution, not adverted to by the majority, which it carefully explained to Congress. This explanation, set forth in the *Tariff Classification Study*, 1960, Vol. 5, p. 134, was as follows:

> The existing tariff provisions with respect to coated or filled fabrics are fragmentary and poorly arranged. Included among them but not specifically designated as a coated or filled fabric, is "waterproof cloth, wholly or in chief value of cotton or other vegetable fiber, whether or not in part of India rubber" in paragraph 907. The provision for waterproof cloth has been controversial over the years. It has been interpreted as including certain fabrics which are not coated or filled within the meaning ascribed to that term in this subpart (CAD 723 [the *Grant* case, supra]). The effect of that court ruling holding so-called water-repellant fabrics to be within this provision in paragraph 907 has been carefully studied, and it does not seem desirable or feasible to

> establish a classification for fabrics on the basis of water repellency unassociated with a coating or filling concept. The provisions for waterproof cloth, therefore, have been assimilated with the coated or filled fabrics in item 355.65.

Appellant's argument, in essence, is that the Commission could not do that, that it had to keep the old paragraph 907 provision as it was before *Grant*. I disagree. I think this was within the intended grant of discretion, without meaning to indicate just what the limits of that discretion were.

Assuming, arguendo, that the particular solution to the "waterproof cloth" problem did go beyond the strict limits of the discretion given to the Commission, however, determined, there is a further reason for affirming in this case. I agree with the government contention that Congress itself—the source of whatever discretionary powers were given to the Commission—approved or ratified the alteration or change in the tariff schedules with respect to waterproof cloth about which appellant complains. Appellant's remedy, therefore, lies with Congress rather than with the courts. After the 1960 report, the legislative and schedule-adopting procedures continued until the final promulgation by Presidential Proclamation No. 3548, effective August 31, 1963. In the interval the House Ways and Means Committee provided an opportnity for interested parties to submit comments on the Tariff Commission proposals, there was the *First Supplemental Report* in January 1962 to committees of House and Senate, which even included a minor change in item 355.65, and Congress passed the Tariff Classificaton Act on May 24, 1962, after receiving the comments and suggestions which had been solicited. I have considered appellant's arguments that the procedures were such that it was "reassured" that paragraph 907 and Public Law 86–795 would be in the new schedules because that is the way it read the requirements of 101(b)(4)(A) of the pending bills, but I do not find therein any comment on the clear statement quoted above from the first *Tariff Commission Study* in which the Commission said what it was doing about waterproof cloth, followed by the *First Supplemental Report* which again dealt with item 355.65, the item in which the first report had said waterproof cloth would be "assimilated." Appellant does not persuade me that there was no ratification by Congress of the Commission's solution to the problem.

On the issue of whether Public law 86–795 effected a "change in tariff treatment," there is the possibility of answering that question both "yes" and "no," depending on how it is viewed. If one looks to the statutes written by Congress, paragraph 907 provided for a certain duty on waterproof cloth. One then had to determine what "waterproof cloth" means. A physical test evolved which created a

loophole in the statute, and the Customs Bureau tried to close it by ruling that the question should be decided by a use, rather than a physical, test. The problem came to this court in *Grant* wherein we held in favor of the physical test. Congress then enacted Public Law 86–795 which, in terms, declared what the *statutory* law "was and is." Thus, there never was a change in the statutory law. As to tariff *treatment*, however, there was a change. The "law," consisting of the statute as interpreted by *Grant*, was changed when Congress declared that the *Grant* interpretation of its statute was not in accord with its intent.

In this situation, I expect that the Tariff Commission would have as much trouble as I do in deciding whether *Grant* changed the "tariff treatment" and Public Law 86–795 changed it back or whether *Grant* merely declared what the law was all along and the Public Law changed it. After making a choice in that respect, there remain other problems: Did the Commission have the discretion to make that choice? Assuming a change, was it a change "in tariff treatment made by statute," or "under authority of law [Grant]"? If the answer is in the affirmative, what then is "necessary" by way of tariff provisions to "reflect" the change? All this is what section 101(b)(4)(A) involves and I see no clearcut answer. Hence this litigation.

My answer is that in a difficult situation the Tariff Commission worked out a practical solution, submitted it to Congress, Congress submitted it to the public, and Congress duly enacted a statute pursuant to which the new TSUS come into being as law. I can see no reasonable ground for holding that part of a repealed statute still exists because it was not "legally" superseded. For these reasons I vote to affirm.

APPENDIX D

CUSTOMS COURT

(C.D. 3828)

AMITY FABRICS, INC. *v.* UNITED STATES

Velveteens

PUBLIC LAW 87–456—TARIFF SCHEDULES

The failure of the Tariff Commission to incorporate specific provision for waterproof cloth into the Tariff Schedules of the United States did not constitute a violation of the dictates of the Tariff Classification Act of 1962, Public Law 87–456.

TARIFF COMMISSION—DISCRETIONARY POWER

By specific language the Tariff Commission was empowered by the provisions of section 101(b)(4)(A) of the Tariff Classification Act to provide in the Tariff Schedules of the United States for such changes in tariff treatment as the Commission decided were necessary. Assuming, without conceding, that Public Law 86–795, approved September 15, 1960, which sets forth the intent and meaning to be given to the term "waterproof" when applied to "cloth" within the context of paragraph 907 of the Tariff Act of 1930, brought about a "change in tariff treatment" it was within the discretion of the Tariff Commission whether or not to incorporate said change in the tariff schedules.

EXERCISE OF DISCRETION—NOT REVIEWABLE

The exercise of a discretionary act by the Tariff Commission, which the Commission was authorized by Congress to perform, is not a proper subject for review.

"WATERPROOF CLOTH"—EFFECT OF PUBLIC LAW 86–795

It was not the intent and effect of Public Law 86–795 to bring about a "change in tariff treatment" for waterproof cloth in paragraph 907 of the Tariff Act of 1930 but to insure a correct interpretation of said provision as it was originally enacted.

TWILL BACK VELVETEEN PILE FABRIC—CLASSIFICATION

Waterproof cloth is not provided for in the present tariff schedules, and may not be inserted by judicial construction. The twill back velveteen pile fabric in issue is *eo nomine* provided for in item 346.24 of said schedules and is properly subject to duty as so classified.

United States Customs Court, Second Division

Protest 65/11623 against the decision of the collector of customs at the port of New York

[Judgment for defendant.]

(Decided May 22, 1969)

***George Brons* for the plaintiff.**

***William D. Ruckelshaus*, Assistant Attorney General (*Sheila N. Ziff*, trial attorney), for the defendant.**

Before RAO and FORD, Judges

RAO, Chief Judge: The instant protest relates to an importation of twill back velveteen pile fabric which was classified under item 346.24 [1] of the Tariff Schedules of the United States, and assessed with duty at the rate of 22½ per centum ad valorem. Plaintiff claims alternatively that said merchandise is dutiable under paragraph 907 [2] of the Tariff Act of 1930, as modified and supplemented by T.D. 51802 and T.D. 54399, respectively, and as amended by Public Law 86–795,[3] at the rate of 11 per centum ad valorem, or "under one or more of the following TSUS items * * * to wit, Items 355.65, 356.25, 798.00, 798.50, or 799.00, dutiable at 10% or 11% ad valorem," or duty free as not covered by any customs duty validly in force. It may be noted, however, that no valid claim for classification on item 799.00 has been made in this case.

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[1] Pile fabrics, in ich the pile was inserted or knotted during the weaving or knitting, whether or n the pile covers the entire surface and whether the pile is wholly or partly cut or is not cut:

Of cotton:

* * * * * * *

Velveteens:

Plain-back ---------- 25% ad val.

Other, including twill-back:

* * * * * * *

Valued over $1.10 per square yard ---------- 22.5% ad val.

[2] Waterproof cloth, wholly or in chief value of cotton or other vegetable fiber, but not in part of india rubber ---------- 11% ad val.

[3] Sec. 2. In order to insure a correct interpretation of the provision "waterproof cloth" in paragraph 907, Tariff Act of 1930, it is hereby declared that it was and is the true intent and meaning of paragraph 907 to limit the term "waterproof", when applied to cloth, "wholly or in chief value of cotton or other vegetable fiber, whether or not in part of India rubber", to cloths of a kind generally used in the manufacture of articles which are designed to afford protection against water to the extent expected in raincoats, protective sheeting, dress shields, umbrellas, and similar articles. Even when cloth possesses water repelling characteristics, it is not classifiable as waterproof cloth within the meaning of paragraph 907, Tariff Act of 1930, unless it is of a kind generally used in the manufacture of articles of the class specified in the preceding sentence.

This case was submitted for decision upon a written stipulation of counsel for the respective parties hereto to the effect that the merchandise in question consists of first quality twill back velveteen pile fabric similar in all material respects, including waterproofing, to the merchandise the subject of *Amity Fabrics, Inc.* v. *United States*, 51 Cust. Ct. 97, C.D. 2416, appeal dismissed 51 CCPA 129, and therein held to be dutiable at the rate of 11 per centum ad valorem under paragraph 907, Tariff Act of 1930, as modified, supplemented, and/or as amended. The record in said C.D. 2416 was incorporated and made a part of the record in this case. The parties reserved all questions of law.

Although the ultimate question to be determined in the instant case is the proper classification of the subject velveteens, the resolution of this question depends not upon the character and composition of the cloth, which have been stipulated, but upon the fundamental issue of whether in failing to incorporate a specific provision for waterproof cloth into the Tariff Schedules of the United States the Tariff Commission violated the dictates of the Tariff Classification Act of 1962, Public Law 87–456.

In essence it is the contention of plaintiff that Public Law 86–795, which amended paragraph 907 of the Tariff Act of 1930, was a statutory change in the tariff treatment of waterproof cloth which should have been reflected in the Tariff Schedules of the United States by virtue of section 101(b)(4)(A) of said Tariff Classification Act of 1962, and that the failure of the Tariff Commission to so provide requires classification of the instant merchandise either under paragraph 907 of the Tariff Act of 1930, as amended by said Public Law 86–795, which allegedly has not been validly superseded, or by similitude to woven or knit fabrics made dutiable under the TSUS at 11 per centum or 10 per centum ad valorem, or as an article entitled to free entry as not one covered by any valid provision of the TSUS.

The Government's position in this case is stated in its brief as follows:

* * * the legislative history of the Tariff Classification Act of 1962 clearly indicates that Congress, with complete knowledge thereof, fully approved the elimination of the waterproof cloth provision from the revised tariff schedules and its replacement by the provision for coated or filled fabrics in Item 355.65; that section 101(b)(4)(A) is neither relevant nor pertinent hereto; and that the shipment at bar was correctly classified.

In 1954, in the Customs Simplification Act, as then amended, Public Law 768, 68 Stat. 1136, Congress directed the Tariff Commission to make a comprehensive study of the laws prescribing the tariff status

of imported articles and to submit a revision and consolidation of those laws which, in the judgment of the Commission, would accomplish, as far as practicable, the following purposes:[4]

(1) Establish schedules of tariff classifications which [would] be logical in arrangement and terminology and adapted to the changes which have occurred since 1930 * * *.

(2) Eliminate anomalies and illogical results in the classification of articles.

(3) Simplify the determination and application of tariff classifications.

The above was to be accomplished without changing rates of duty other than those incidental rate changes which the Commission considered necessary to accomplish its ultimate objective. When such rate changes were foreseen by the Tariff Commission as being necessary the Commission was directed to hold hearings to give interested parties an opportunity to be heard with respect to the probable effect of any such suggested changes on any industry in the United States.

On March 15, 1955, the Tariff Commission submitted to the President and to the Chairmen of the Committee on Ways and Means of the House and the Committee on Finance of the Senate a report discussing some of the problems which the Commission hoped to resolve and some of the standards which it expected to follow.

Following its initial efforts at setting up new tariff enumerations, the Commission released proposed new schedules (at different times between January 1958 and June 1959). During this period public hearings were held at which interested parties were given an opportunity to appear and to present their views relative to the proposed schedules.

On November 15, 1960, the Tariff Commission submitted to the Chairmen of the Committee on Ways and Means of the House and the Committee on Finance of the Senate a ten volume report, *The Tariff Classification Study*. The *Study* and the proposed schedules contained therein reflected rates of duty in force as of July 31, 1960. Among the matters called to the attention of Congress in this submitting report was the fact that the proposed schedules differed from the 1930 Tariff Act in not including a specific provision for waterproof cotton cloth. In the explanatory comments accompanying the proposed schedules the Commission explained its reasons for omitting a waterproof cloth provision as follows:[5]

The existing tariff provisions with respect to coated or filled fabrics are fragmentary and poorly arranged. Included among them but not specifically designated as a coated or filled fabric, is "waterproof cloth,

[4] Customs Simplification Act of 1954, section 101(a).

[5] *Tariff Classification Study*, Schedule 3, part 4, p. 134.

wholly or in chief value of cotton or other vegetable fiber, whether or not in part of India rubber", in paragraph 907. The provision for waterproof cloth has been controversial over the years. It has been interpreted as including certain fabrics which are not coated or filled within the meaning ascribed to that term in this subpart (CAD 723). The effect of the court ruling holding so-called water-repellent fabrics to be within this provision in paragraph 907 has been carefully studied, and it does not seem desirable or feasible to establish a classification for fabrics on the basis of water repellency unassociated with a coating or filling concept. The provisions for waterproof cloth, therefore, have been assimilated with the coated or filled fabrics in item 355.65.

On September 15, 1960, after the cut-off date of the *Tariff Classification Study*, to wit July 31, 1960, but before the study was submitted to Congress and to the President, Congress approved Public Law 86–795, section 2,[6] which amended paragraph 907 of the Tariff Act of 1930 by restricting the applicability of said paragraph to cloths "of a kind generally used" for protective purposes. Plaintiff claims that even though Public Law 86–795 was passed specifically as an amendment to paragraph 907 of the 1930 Act, it should have been incorporated into the tariff schedules as finally published in August 1963. Plaintiff bases this contention on a reading of the Tariff Classification Act of 1962, which announced a procedure for adopting and implementing the new tariff schedules. The portions of that act relevant to this question (Public Law 87–456, section 101(b)) provide that the tariff schedules

> * * * shall consist of—
>
> (1) the general headnotes and rules of interpretation;
>
> (2) schedules 1 to 8, inclusive; and
>
> (3) the appendix to the tariff schedules; all as set forth in the report of the United States Tariff Commission * * * entitled "Tariff Classification Study, Proposed Revised Tariff Schedules of the United States", dated November 15, 1960, as changed by the "First Supplemental Report" (January 1962); and
>
> (4) subject to subsection (c), such changes in the provisions identified in paragraphs (1), (2), and (3) of this subsection as the Commission decides—
>
> (A) are necessary to reflect changes in tariff treatment made by statute or under authority of law, arising either before the date of the enactment of this Act or on or after such date of enactment and before the date on which the Tariff Schedules of the United States is published pursuant to subsection (d), or
>
> (B) are otherwise necessary.
>
> In its determinations under this paragraph, the Commission shall apply the standards it applied in its report of November 15, 1960. referred to above.

[6] See footnote 3, *supra*.

Plaintiff contends that Public Law 86–795 was a change in tariff treatment and that the Commission was compelled under section 101 (b) (4) (A) of the Tariff Classification Act to incorporate that change into the new tariff schedules.

Assuming arguendo, though we do not so find, that Public Law 86–795 was a "change in tariff treatment," we nevertheless are of opinion that the instructions given to the Commission in section 101 (b) (4) (A) of the Tariff Classification Act were discretionary rather than mandatory and that plaintiff is without grounds to challenge the Commission's use of its discretion.

The statute explicitly provides that the schedules shall include:

> [Sec. 101 (b)] (4) * * * such changes * * * *as the Commission decides*—
> (A) are necessary to reflect changes in tariff treatment * * * [Emphasis supplied].

Thus the Commission was specifically authorized to judge whether certain changes were to be incorporated into the new tariff schedules. The fact that changes in tariff treatment may have occurred within the time prescribed in the statute did not *ipso facto* make these changes part of the tariff schedules. We do not doubt that Congress could have provided that all such changes were to be automatically adopted. However, since Congress, under the Customs Simplification Act, had given the Commission the original task of drawing up the schedules, it was appropriate also to authorize the Commission to decide what subsequent changes should be incorporated into the schedules. The fact that Congress may not have foreseen the particular situation before us when it chose the wording of that particular section of the Tariff Classification Act does not justify construing it in a way which is directly inconsistent with the very words used therein. As stated in *Barr* v. *United States*, 324 U.S. 83, 90: "* * * [I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators." Citing *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 257; *Browder* v. *United States*, 312 U.S. 335, 339.

A further indication that section 101 (b) (4) (A) vested the Commission with discretion is apparent from the final lines of paragraph (4), which provide: "In its determinations under this paragraph, the Commission shall apply the standards it applied in its report of November 15, 1960 * * *," It seems reasonable that, in order to produce unified and coherent schedules, the same standards used in originally drawing up the schedules should also be used when the Commission was deciding whether any subsequent changes should be made

therein. The standards [7] provided that the Commission would restate existing tariff treatment to the fullest extent consistent with desirable changes in treatment to *carry out the purposes of the tariff study*.[8]

Thus the standards, which provided a certain amount of flexibility in drawing up the originally proposed schedules, also gave the Commission flexibility to consider whether or not to incorporate certain subsequent changes, depending on whether these changes helped to "carry out the purposes of the tariff study." Those purposes, as discussed *supra*, were basically to establish schedules which would be more logical and less anomalous than the 1930 Act. In effect the Tariff Commission was authorized to decide that a change in tariff treatment which might have been desirable under the 1930 Act, would not be desirable as part of the proposed schedules in view of the overall objectives of the Customs Simplification Act. The fact that the law had been amended should not restrict the Commission if it thought that, even as amended, the provision was not practical under current conditions. "What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 305. Citing *Hampton & Co.* v. *United States*, 276 U.S. 394; *Buttfield* v. *Stranahan*, 192 U.S. 470; *Field* v. *Clark*, 143 U.S. 649.

The exhibit "C" attachment to plaintiff's brief reflects the commission's judgment that Public Law 86–795 should not be incorporated into the new schedules. Said exhibit, a letter (dated February 28, 1963) to plaintiff's counsel from the Tariff Commission in response to his requests to modify certain items of the proposed schedules to reflect the changes resulting from Public Law 86–795, stated:

> In the opinion of the Commission, Public Law 86–795 did not remove the problem associated with the existing provision in paragraph 907, Tariff Act of 1930, for waterproof cloth. The Commission continues to believe, as expressed in the explanatory notes relating to schedule 3 (page 134), that it is neither desirable nor feasible to establish a classification for velveteens or other fabrics on the basis of water repellency unassociated with a coating or filling concept. In the circumstances, the Commission is of the opinion that the changes in the new schedules you request are not warranted.

Nothing in the legislative history of the Tariff Classification Act leads us to conclude otherwise than that the Tariff Commission had the discretion to omit certain subsequent changes. In reporting section

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[7] Listed in the November 15, 1960 report, p. 6, they are really a summary of more detailed standards originally set out in the Commission's 1955 interim report.

[8] There were two additional standards listed in the 1960 report which are not relevant here.

101(b) of the bill which eventually became the Tariff Classification Act of 1962 both the House Ways and Means Committee and the Senate Finance Committee stated:

* * * The only changes which can be made in the tariff schedules, after the enactment of this bill, will be those which the *Tariff Commission finds are required to be made* by virtue of legislation, court decisions, or authoritative administrative decisions, all of which necessarily must be reflected in the new tariff schedules. Certain other changes, such as those necessary to correct errors or inadvertent omissions or to clarify language cannot be made until reviewed by Congress. * * * The same standards which governed the Commission in the preparation of the tariff schedules will apply to subsequent Commission action on these schedules. [House Report No. 1415 (87th Cong.), page 4; Senate Report No. 1317 (87th Cong.), page 4.] [Emphasis supplied.]

Since the only changes which could be made were those which the Tariff Commission found were required to be made, we understand this to imply that the Commission was authorized to conclude that certain changes affecting existing provisions of the 1930 Act, were not required to be made in view of the standards which it originally followed. It was only the changes which the Commission *found* were required to be made, *in view of its 1960 standards*, which necessarily had to be reflected in the new schedules. Thus the statute itself as well as the Senate and House reports convinces us that the Tariff Commission's power to reflect subsequent changes in tariff treatment in the new tariff schedules was discretionary and was to be viewed in relation to its overall objectives as set out in the Customs Simplification Act. Whether that discretion was used wisely is not the question before us because:

* * * It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. [*United States* v. *George S. Bush & Co., Inc.*, 310 U.S. 371, at 380. See also *The Best Foods, Inc.* v. *United States*, 39 Cust. Ct. 305, at 307; aff'd *United States* v. *The Best Foods, Inc.*, 47 CCPA 163, C.A.D. 751.]

We find, therefore, that the Tariff Commission had the discretion to disregard the effects of Public Law 86–795 upon the 1930 provision for waterproof cloth, and its use of that discretion in not modifying the tariff schedules to provide *eo nomine* for waterproof cloth is not subject to judicial review.

While we are of the opinion that the above conclusion suffices to dispose of this case on the merits, we are nevertheless inclined to dis-

cuss several other aspects of the case which have been urged with much vigor.

Were it to be conceded notwithstanding the foregoing that the Commission was under a mandatory duty to reflect in the schedules every change in tariff treatment, it becomes pertinent to consider whether Public Law 86–795 was, in fact, a change in tariff treatment as contemplated by section 101(b)(4)(A) of the Tariff Classification Act.

The effect to be given to amendment of certain statutes is discussed in Sutherland's *Statute and Statutory Construction*, 3d ed., 1943, vol. II, sec. 5110, pp. 526–7 as follows:

> Where a former statute is amended, or a doubtful meaning of a former statute rendered certain by subsequent legislation a number of courts have held that such amendment or recent legislation is strong evidence of what the legislature intended by the first statute. This rule was well expressed in an Indiana case where the court said, "If it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute."

This was the rule applied in *Jordan* v. *Roche*, 228 U.S. 436, wherein the court stated:

> * * * The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law.

In *United States* v. *Geo. Wm. Rueff, Inc.*, 41 CCPA 95, C.A.D. 535, our appellate court, in considering the effect of the insertion in the tariff provision for "all binding twine" (paragraph 1622 of the Tariff Act of 1930) of the language "and twine chiefly used for baling hay, straw and other fodder and bedding materials," stated:

> * * * About the only thread of continuity we have been able to obtain from the authorities cited is that the particular facts involved in each case largely determine the proper interpretation to be placed on subsequent Congressional action. We believe the circumstances here are more than ample to support our conclusion that Congress intended only to clarify the language originally employed in paragraph 1622.

Although there is authority to the contrary tending to suggest that legislative explanation of an earlier measure constitutes evidence that the previous statute meant the exact opposite, upon the theory that the legislature is not presumed to do a useless act, we do not find such inconsistency in the legislation now under consideration to warrant the application of this principle.

Here it appears that ambiguity resulted not from the statutory provision but from an interpretation thereof, which Congress in Public Law 86–795 expressly indicated it had never intended. The legislative purpose to clear up any uncertainties as to "the true intent and meaning of paragraph 907" of the Tariff Act of 1930 to "insure a correct interpretation of the provision 'waterproof cloth' " is plainly stated by the Congress.

If in addressing itself to the problems resulting from the classification of cotton cloth as waterproof cloth, Congress had intended to effectuate a change in the law, its language does not so indicate. On the contrary its use of the phrase "was and is" reflects a constancy of attitude, inconsistent with the notion of change. Congress was not only spelling out the meaning to be applied to "waterproof cloth" subsequent to the passage of that amendment, but was also saying that it had intended this to be the understanding and interpretation of "waterproof cloth" when Congress originally passed the provision relating thereto in 1930.

The legislative history of Public Law 86–795 makes it clear that Congress was primarily attempting to plug a loophole in paragraph 907 of the 1930 Act which resulted from what was considered an improper interpretation of the term "waterproof cloth" by the courts. The bill (S. 3828) was originally introduced by Senator Pastore of Rhode Island to help manufacturers of typewriter ribbon, already suffering from the competition of low-priced imports, who were hurt even more when the cloth was temporarily coated with a water repellent substance and then imported at the exceptionally low rate of duty applicable to waterproof cloth. That such was never intended to be the effect of paragraph 907 is apparent from much of the congressional discussions concerning the proposed amendment.[9] Throughout the discussion of the amendment it is apparent that the purpose of Public Law 86–795 was to stop a practice which Congress had

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[9] Mr. Pastore. • • • All we are doing by this amendment is saying the ultimate objective of the cloth—its end use—should determine whether or not it should be admitted as waterproof. In other words, if it is to be used for making a tent, it ought to be termed "waterproof." If it is to be used for a raincoat, it ought to be termed "waterproof." But if it is to be used as a "blotter," it should not be made waterproof first, and then, after the cloth gets into the country, washed out and used as a "blotter." [Congressional Record, 86th Cong. 2d sess., vol. 106, part 12, p. 16021.]

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In other words let us not encourage our friends to contravene the *intent of our law* by finding ways and means, through loopholes and subterfuge, to defeat the very purpose of the law. If it is waterproof cloth, let us say so, and have it come in under the waterproof cloth categories. If it is not for waterproof purposes, let us say so. • • • [P. 16022.] [Emphasis supplied.]

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Mr. Pastore. • • • The purpose of this amendment • • • is to close a loophole in

never intended to occur in the first place. Since the situation had arisen from an interpretation of the term "waterproof" in a manner contrary to the original intent of Congress, the amendment was passed to clarify the meaning of the term and to prevent the recurrence of what it considered an erroneous interpretation.

Since no intervening change was effected by the enactment of Public Law 86–795, the Tariff Commission was under no compulsion to revise its treatment of waterproof fabrics.

Moreover it is clear from the Tariff Commission's discussion of its policies concerning the waterproof cloth provisions of the 1930 Act, that an entirely new approach was contemplated. The conclusions were not predicated upon the considerations which prompted the congressional emphasis upon use in the 1960 amendment to paragraph 907.

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our tariff law which has led to a practice which, in essence, violates the intent and spirit of our reciprocal trade agreements. [Part 13, p. 17856.]

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Mr. Bush [of Connecticut]. I fully endorse what the Senator from Rhode Island has said. There is obviously a loophole in the law. *It was not intended that this situation should ever exist,* or that it should continue. • • • [Part 13, p. 17857.] [Emphasis supplied.]

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Mr. Byrnes of Wisconsin. • • • The new Senate amendment in effect *clarifies the meaning of the term "waterproof"* when applied to certain cloths of a kind generally used in the manufacture of articles which are designed to afford protection against water to the extent expected of raincoats, protective sheeting and so forth. • • • [Part 14, p. 18756.] [Emphasis supplied.]

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Mr. Mills. • • • The Senate amendment endeavors to *correct an interpretation of the provision "waterproof cloth"* which is contained in paragraph 907 of the Tariff Act of 1930. What we are doing is enacting a regulation of the Treasury Department, Bureau of Customs, with respect to what constitutes waterproof cloth. The matter was recommended to us by the Treasury Department and the Department of Commerce, this being necessary, so we were told, to plug a loophole in the Tariff Act in order to prevent materials from coming into the United States that are not to be used for waterproof purposes under the waterproof paragraph at much less tariff duty than they would have to pay if they came through under the proper tariff paragraph. It is that simple.

It has nothing whatsoever to do with the quantity that may come in, but we are determined, as far as the conference committee is concerned, to insure that when things come into the United States from abroad, they must pay the rate of duty prescribed by law and that *they should not be permitted to come in in violation of the intention of the law and the interpretation of the law by the Bureau of Customs.* [Part 14, p. 18756.] [Emphasis supplied.]

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Mr. Mills. Let me explain to the gentleman what it does. It has to do with the definition of "waterproofing." If material comes into the United States for the purpose of being used for waterproof purposes, it will continue to come under this paragraph. However, if it is not to be used for that purpose—take gingham that is coming in here as dress material, and not to be used as a waterproof material at all, should it be permitted to enjoy a lesser rate of duty because they can smear something on it and make it possible to be classified as a waterproof cloth, and interpreted by the court? We do not think they should be permitted to make a shambles of provisions of the tariff law, and that the people who import these things into the United States ought to pay what the law requires them to pay and *what it is intended they should pay.* [Pp. 18756–57.] [Emphasis supplied.]

They rested upon a concept which derived from a coating or filling operation during the manufacturing process. As a consequence the 1930 Public Law gave rise to no conflict requiring adjustment to reflect changes made by statute subsequent to the time the Tariff Commission Studies were first completed.

Especially is this true with respect to the commodity here in question. Velveteen cloth which had been subjected to a waterproofing process and met the so-called cup test for water repellency was waterproof cloth within the standards applied by the courts under the 1930 provision as originally enacted. *D.H. Grant & Co., Inc.* v. *United States*, 42 Cust. Ct. 51, C.D. 2065, affirmed *United States* v. *D.H. Grant & Co., Inc.*, 47 CCPA 20, CAD 723. Velveteen cloth such as here involved which met the cup test for water repellency and was shown to be of a kind generally used in the manufacture of articles designed to protect against water penetration was held to be waterproof cloth as provided in paragraph 907, amended by Public Law 86–795. *Amity Fabrics, Inc.* v. *United States*, *supra*. Hence the classification of velveteen was not beneficially affected by the amended paragraph 907.

We address ourselves to one final point. Even assuming arguendo, that we were to agree with plaintiff's contentions we would be faced with a perplexing situation which may be briefly summarized as follows: The Tariff Commission, as one phase of carrying out the Customs Simplification Act of 1954, decided to eliminate the provision for waterproof cloth and assimilate it with the provision for coated or filled fabrics in item 355.65 of the tariff schedules. Said item was one of several which were eventually adopted when Congress approved the Tariff Classification Act. In passing said act Congress simultaneously repealed (by virtue of section 101(a)) the Tariff Act of 1930 in its entirety, thus also repealing paragraph 907. No savings clause was provided. Thus even if we were to find that Public Law 86–795 should have been incorporated into the tariff schedules there would be no place now to include said provision since it interprets the term "waterproof cloth" as that term was used in paragraph 907 of the 1930 Tariff Act, and not only is said paragraph repealed but there is no waterproof cloth category provided for anywhere in the tariff schedules. This court has the power to interpret and enforce the law as written but does not have the power to amend the law or draw up a provision dealing with waterproof cloth. See *C. M. Gourdon, Inc.* v. *United States*, 33 Cust. Ct. 253, C.D. 1662, aff'd 43 CCPA 4, C.A.D. 601; *Low Wah Suey* v. *Backus, Commissioner of Immigration*, 225 U.S. 460.

Since the parties have agreed that the velveteen in question is a pile fabric, it is not classifiable, either directly or by similitude, under item 355.65 or 356.25, which specifically except pile fabrics. Nor is it classifiable under items 798.00, 798.50 or 799.00 since the provision under which the goods were assessed most specifically describes the importation. Nor can they be admitted free of duty for the reason that there is a dutiable provision for velveteen validity in force.

In view of the foregoing considerations, classification of the importations at bar as other than plain back velveteen in item 346.24 of the TSUS will not be disturbed, and the protest claims are overruled.

Judgment will be entered accordingly.